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In The

Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

AND

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE SERVICE AT ISSUE IS TRANSPORTATION PROVIDED BY A RAIL CARRIER	1
A. The Statutory Construction and Interpretation Urged By Texas is Contrary to Established Precedent	2
B. Application of the Exemption to the Intrastate Motor Portion of TOFC/COFC Transportation Provided by a Rail Carrier is Consistent With Congressional Policy	5
II. THE PRACTICAL EFFECT OF TEXAS' POSITION IS TO PREVENT CONGRESSIONALLY MANDATED COMPETITION	6
III. RECENT DECISIONS OF THIS COURT DO NOT SUPPORT THE ARGUMENTS MADE BY TEXAS	8
IV. CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Pages
American Trucking Associations v. Interstate Commerce Commission, 656 F.2d 1115 (5th Cir. 1981)	1, 2, 3, 5
Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984)	3
Illinois Central Gulf R.R. Co. v. ICC, 702 F.2d 111 (7th Cir. 1983)	2
Illinois Commerce Commission v. ICC, 749 F.2d 875 (D.C.Cir. 1984), *cert. den.* 106 S.Ct. 70 (1985)	4
Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981)	1
Louisiana Public Service Com. v. FCC, 476 U.S. —, 90 L.Ed.2d 369, 106 S.Ct. 1980 (1986)	8
Railroad Commission of Texas v. United States, 765 F.2d 221 (D.C. Cir. 1985)	4
State Intrastate Rail Authority—Texas, 1 I.C.C. 2d 76 (1984)	4
Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. —, 106 S.Ct. 709, 88 L.Ed. 2d 732 (1986)	7, 8, 9, 10
Utah Power & Light Co. v. ICC, 747 F.2d 721 (D.C. Cir. 1983), *supplemented on rehearing*, 764 F.2d 865 (D.C.Cir. 1985)	2
Wheeling Pittsburgh Corp. v. ICC, 723 F.2d 346 (3rd Cir. 1983)	2

TABLE OF AUTHORITIES—Continued

Pages

STATUTES:

Communications Act of 1934, 47 U.S.C. 152(b) 8

Interstate Commerce Act

49 U.S.C. 10101a(4) 6

49 U.S.C. 10101a(5) 6

49 U.S.C. 10102(25) 3

49 U.S.C. 10505 ..... *passim*

49 U.S.C. 10505(a) 2

49 U.S.C. 10505(d) 7

49 U.S.C. 10505(f) 2

49 U.S.C. 10523 3

49 U.S.C. 11501 ..... 4, 5, 8

49 U.S.C. 11501(b)(4)(B) 4

Staggers Rail Act of 1980, Public Law 96-448, 94 Stat. 1985 ..... 5, 9

Transportation Act of 1940, Ch. 722, 54 Stat. 920 3

Legislative History:

H.R. Rep. No. 96-1035, 96th Cong. 2d Sess. 128 (1980) 5

H.R. Conf. Rep. No. 96-1430, 96th Cong. 2d Sess. 83 (1980) 5

This brief is filed by petitioners, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and Southern Pacific Transportation Company (hereinafter referred to as "Railroads") in reply to the brief filed by the State of Texas (Texas). As will be shown below, Texas' position is contrary to applicable law and should be rejected. The issue before this Court is whether the Interstate Commerce Commission (ICC) has the power to exempt from regulation under 49 U.S.C. 10505[1] the motor portion of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) intrastate transportation provided by a rail carrier as part of a continuous intermodal move in intrastate commerce. As noted below, the power of the ICC to exempt the same interstate service has been upheld by the same circuit in *American Trucking Associations v. Interstate Commerce Commission*, 656 F.2d 1115 (5th Cir. 1981) (*ATA*). Railroads respectfully submit that the ICC clearly has the power to exempt the motor portion of such intrastate transportation provided by a rail carrier.

I. THE SERVICE AT ISSUE IS TRANSPORTATION PROVIDED BY A RAIL CARRIER.

In *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), the ICC used its power under 49 U.S.C. 10505 to exempt both the rail and motor portion of TOFC and COFC transportation provided by rail carriers as part of a continuous intermodal move whether in interstate or intrastate commerce. The ICC's decision was upheld in *ATA*. Texas apparently concedes that *ATA* applies to both the rail and motor portion of interstate TOFC/COFC transportation provided by rail carriers and to the rail portion of intrastate TOFC/COFC transportation provided by rail carriers. Texas, however, does contend (supported by the

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[1] See pages 37a-39a Appendix To Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit (Appendix) for text of the statute.

court below) that *ATA* does not apply to the motor portion of intrastate TOFC/COFC transportation provided by a rail carrier.

This contention is not valid because under 49 U.S.C. 10505, the ICC's exemption power applies to matters relating to transportation provided by a rail carrier. The motor portion of intrastate TOFC/COFC service provided by a rail carrier is clearly a matter relating to transportation provided by a rail carrier. Therefore, under 49 U.S.C. 11501, the states are required to apply the full exemption as a Federal standard and procedure. *Illinois Central Gulf R.R. Co. v. ICC*, 702 F.2d 111 (7th Cir. 1983); *Wheeling Pittsburgh Corp. v. ICC*, 723 F.2d 346 (3rd Cir. 1983); and *Utah Power & Light Co. v. ICC*, 747 F.2d 721 (D.C. Cir. 1985), *supplemented on rehearing*, 764 F.2d 865 (D.C. Cir. 1985). Essentially, Texas argues that "transportation provided by a rail carrier" as used in 49 U.S.C. 10505 has one definition when referring to interstate TOFC/COFC transportation and another definition when referring to intrastate TOFC/COFC transportation. Railroads submit that such statutory construction and interpretation is not permissible under established precedent and is, indeed, contrary to Congressional intent.

A. The Statutory Construction and Interpretation Urged by Texas is Contrary to Established Precedent.

Under 49 U.S.C. 10505(a) the ICC, when certain circumstances exist, must grant an exemption in matters relating to a rail carrier providing transportation subject to the jurisdiction of the ICC. That authority specifically allowed the ICC ". . . to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement." (49 U.S.C. 10505[f]). The ICC has exercised that power. The ICC construed the provision above as in-

cluding both the rail and motor portions of TOFC/COFC transportation provided by a rail carrier.

In reviewing the ICC's construction of a statute that the ICC administers, the question is

> "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed in intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843, 81 L.Ed. 2d 694, 104 S.Ct. 2778 (1984).

In this case the intent of Congress is clear that "transportation provided by a rail carrier" includes both the rail and motor portion of intrastate TOFC/COFC transportation provided by a rail carrier. 49 U.S.C. 10102(25) provides that " 'transportation' includes

> (A) a locomotive, car, vehicle, motor vehicle, . . . related to the movement of passengers or property. . . ."

A matter relating to transportation provided by a rail carrier, therefore, includes a motor vehicle related to the movement of property operated by a rail carrier.[2] As found by the court in *ATA*, at p. 1120, Congress could easily have limited the ICC's authority to transportation in rail cars but did not do so. Having shown that transportation provided by a rail carrier includes both the rail and motor portion of a continuous intermodal move, the next step is to determine whether the ICC has authority over both intrastate and interstate transportation provided by a rail carrier.

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[2] The concept that transportation provided by a rail carrier can include motor vehicle service provided by a rail carrier is not new. Congress specifically adopted the concept in the Transportation Act of 1940, Ch. 722, 54 Stat. 920 (See 49 U.S.C. 10523).

49 U.S.C. 11501[3] embodies Congressional policy concerning ICC authority over intrastate transportation. Section 11501(b)(4)(B) provides that:

> "[a]ny intrastate transportation provided by a rail carrier in a state which may not exercise jurisdiction over an intrastate rate, clarification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of Chapter 105 of this title."

In other words, the ICC now has complete jurisdiction over Texas intrastate transportation provided by a rail carrier since the Railroad Commission of Texas (RCT) was denied certification by the ICC.[4] Texas intrastate transportation provided by a rail carrier is now deemed to be subject to ICC jurisdiction. Contrary to the argument that the RCT's decertification is immaterial, the lack of certification to regulate intrastate transportation provided a rail carrier is fatal to Texas' argument. In fact, even if the RCT was certified, it would be required to apply the exemption under 49 U.S.C. 10505 to both the rail and motor portions of TOFC/COFC intrastate transportation provided by a rail carrier.[5]

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[3] See Appendix pp. 30a-37a for text.

[4] *State Intrastate Rail Rate Authority—Texas*, 1 I.C.C. 2d 26 (1984), *aff'd* in *Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C.Cir. 1985) (*RCT*).

[5] See the unchallenged discussion regarding of *Illinois Commerce Commission v. ICC*, 749 F.2d 875 (D.C.Cir. 1984) *cert. den.* 106 S.Ct. 7 (1985), at pp. 14-16 of Railroads' opening brief. Since Texas did not challenge Railroad's position concerning this case, Railroads will not discuss it further in this reply brief.

B. Application of the Exemption to the Intrastate Motor Portion of TOFC/COFC Transportation Provided By a Rail Carrier is Consistent with Congressional Policy.

One of the major policies adopted by Congress in the Staggers Rail Act (Staggers Act)[6] was to alleviate the problem of "multiple and diverse regulations at the state level" faced by the railroad industry. H.R. No. 96-1035, 96th Cong. 2d Sess. 128 (1980). Section 214 (49 U.S.C. 11501) of the Staggers Act was the solution chosen by Congress and that section limits "[s]tate authority over intrastate transportation . . . to administering the provisions of the Interstate Commerce Act." H.R. Conf. Rep. 96-1430, 96th Cong. 2d Sess. (1980). The clearly enunciated Congressional intent was to:

> "ensure the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulations of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classification, rules and practices. States may only regulate in these areas if they are certified under the procedures of this section." H.R. Conf. Rep. 96-1430, *supra*, p. 106.

Texas even concedes in its brief (p. 9) that Congress has preempted the economic regulation of intrastate transportation provided by a rail carrier. That concession should be dispositive since Railroads have shown and the court in *ATA* agreed, that the motor portion of TOFC/COFC service was encompassed in the Congressional definition of transportation provided by a rail carrier.

Further, to accept the Texas view that the motor portion of intrastate TOFC/COFC transportation provided by a rail carrier is actually motor carrier service would

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[6] Pub. L.No. 96-448, 94 Stat. 1895

frustrate the clearly enunciated policy of uniformity between interstate and intrastate regulation of transportation provided by rail carriers. Texas' argument that disparity between interstate and intrastate regulation of transportation provided by rail carriers is permitted by Congress is simply incorrect. As shown above, Congress has clearly mandated that there is to be uniformity between interstate and intrastate regulation especially when the state is not even certified to continue intrastate rail regulation.

II. THE PRACTICAL EFFECT OF TEXAS' POSITION IS TO PREVENT CONGRESSIONALLY MANDATED COMPETITION.

Congress decided in the Staggers Act that the government policy in regulating the railroad industry was to:

> "ensure the devolopment and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;" (49 U.S.C. 10101a[4]) and to
>
> "foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes; . . . ." (49 U.S.C. 10101a [5]).

If the position adopted by Texas and the court below is upheld, these policies will be frustrated. Texas has candidly conceded that its real purpose in seeking to regulate the transportation at issue is to prevent rail carriers from competing with intrastate motor carriers. At page 10 of its brief, Texas points out that if the motor portion was exempt, railroads would have an "unfair" competitive advantage over regulated intrastate motor carriers. Again at page 13 on its brief, Texas refers to "the devastation that such fleets of railroad-owned trucks could wreck upon

Texas' regulated motor carriers if permitted the unfair competitive advantage of deregulation."

These admissions by Texas are really quite astounding and are illustrative of the problems Congress sought to cure in preempting state regulation by states not certified because of a failure to follow Federal standards and procedures.[7] Texas apparently opposes the congressionally mandated policy of rail competition with motor carriers. Railroads submit that Congress, not Texas, has the power to make that decision and that Congress has chosen competition over economic regulation. That is the teaching of this Court's recent decision in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. —, 106 S.Ct. 709; 88 L.Ed.2d 732 (1986) (*Transco*). Further, if the Texas motor carriers really were concerned about the transportation at issue here, one wonders why they have not bothered to appear at any stage of the ICC or court proceedings. In any event, their remedy would be to seek a revocation or modification of the exemption at the ICC pursuant to 49 U.S.C. 10505(d).

In reality, affirmance of the decision below would prevent rail carriers providing intrastate TOFC/COFC transportation from being effective competitors. At page 11 of their opening brief Railroads pointed out the effect of the disparate treatment of interstate and intrastate TOFC/COFC transportation by a rail carrier envisioned by Texas. It is quite interesting to note that Texas did not dispute the accuracy of the example or the real and tangible harm that would be suffered by Railroads if the decision below is upheld. Texas merely responds that such

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[7] The RCT was decertified precisely because of its failure to folow Federal Standards and procedures. See *RCT, supra.*, at pp. 224-226.]

results are Congressionally condoned. See Texas' brief p. 16. That position is totally wrong as has been discussed above.

III. RECENT DECISIONS OF THIS COURT DO NOT SUPPORT THE ARGUMENT MADE BY TEXAS.

Texas contends that this Court's recent decision in *Louisiana Public Services Com. v. FCC*, 476 U.S. —, 90 L.Ed.2d 369, 106 S.Ct. 1890 (1986)(*LPSC*) requires that the decision below be affirmed. Such a view is contrary to even a cursory review of the *LPSC* decision. In that case the FCC was attempting to compel the states to adopt FCC-set depreciation practices and schedules in connection with the setting of intrastate rates. This Court concluded the FCC did not have power to compel the states to adopt the FCC-set depreciation practices and schedules. The basis for the decision was a statutory provision denying the FCC jurisdiction with "respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. 152(b). In other words, the FCC was specifically prohibited from regulating the area it was trying to regulate —ie. intrastate communication service.

The situation at issue here is vastly different. The ICC here is specifically authorized by 49 U.S.C. 10505 and 11501 to regulate or exempt from regulation the motor portion of intrastate TOFC/COFC transportation by a rail carrier and the states are obligated to implement that exemption. Rather than being specifically prohibited from regulating the service, the ICC is authorized by Congress to regulate the transportation in question. Therefore, *LPSC* is not dispositive of the case before this Court.

Texas also asserts that Railroads' reliance on *Transco* is misplaced. See Texas' brief, pp. 19-20. *Transco* held

that a federal decision to forego regulation does not empower the states to step in and fill the regulatory void. Texas is, of course, attempting to do just that by trying to regulate the transportation at issue here. The basis for the *Transco* decision was that allowing the states to substitute economic regulation for a federal decision to let market forces control would disrupt the uniformity of federal regulatory policy and would raise the ultimate price to consumers.

The Congressional policy of uniformity between regulation of interstate and intrastate transportation provided by a rail carrier has been previously discussed. That discussion will not be repeated here other than to say the Texas position, if allowed to stand, would disrupt that policy.

The question of the ultimate price to the consumer is also relevant. If the Texas position is upheld, rail carriers will be forced to provide a higher cost service to intrastate shippers than to interstate shippers. If Texas is allowed to regulate the motor portion of intrastate TOFC/COFC transportation provided by a rail carrier, Railroads will either have to attempt to become certified motor common carriers or will have to use other certificated motor carriers to perform that function. Either way, Railroads will not be able to provide the competition envisioned by the Staggers Act.

Even though both interstate and intrastate TOFC/-COFC traffic moves in the same type of trailers or containers, on the same cars and in the same trains, the intrastate traffic will be subject to additional and, therefore, more costly handling. Also, rail carriers trying to compete for intrastate business to move in TOFC/COFC service will not have the flexibility to adjust prices to meet mar-

ket conditions. In other words, they will not have the flexibility they presently have in handling interstate TOFC/-COFC business. Texas still has not given any practical reason why there should be a difference and the decision below certainly offers no justification. In fact, Texas has not shown why a disparity of treatment is desirable as a matter of public policy. The Texas position is a throwback to the days of heavy handed economic regulation. Congress has decided to move away from those policies and Texas should not be allowed to frustrate that policy.

Texas desires to exercise economic regulation over rail carriers to protect intrastate motor carriers from competition. The result is to ultimately cost consumers more for transportation service than would be the case if the Congressional policy of reliance on competition was followed. Under *Transco*, Texas does not and should not have that option.

IV. CONCLUSION

For the reasons stated above, Railroads respectfully request the Court to reverse the decision below.

Respectfully submitted,

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